No. 208.

Br. of Artz for Petitioner

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Supreme Court of the United States.

OCTOBER TERM 1900

NO. 503

FREDERICK WILLIAMS,

Petitioner

against

GEORGE C. GAYLORD, CHARLES E. MADDRILL and DWIGHT T. ROLFE

Respondents

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

C. WALTER ARTZ,
For Petitioner

Supreme Court of the United States.

OCTOBER TERM 1900

FREDERICK WILLIAMS,
Petitioner,
AGAINST
GEORGE C. GAYLORD, CHARLES E. MADDRILL AND DWIGHT T. ROLFE,
Respondents.
No. 503

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF APPLICATION TO THIS COURT FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement.

The suit was brought by the petitioner the trustee of a first mortgage made and executed by the Gold Hill Mining Company, a corporation of the state of West Virginia covering certain mining property located in Nevada county in the state of California, to obtain a decree of foreclosure and sale; and the respondents with the firm of Martin Brothers & Muir were joined as defendants additional to the

Company upon the ground that they had or claimed to have some interest in or lien upon the premises sought to be foreclosed either as judgment creditors or otherwise; which interest or lien, if any, the complainant however averred was subsequent and subordinate in time and degree to the lien of the mortgage sued upon.

Bill Paragraph VIII; Record p. 9.

The Company and said Martin Brothers & Muir defaulted in pleading and a decree *pro confesso* was entered against them.

Record p. 33.

The respondents are judgment creditors whose judgments were entered long after the record of the mortgage in suit, i e, in the years 1896 and 1897.

Record pp. 43, 52, 55, 71, 85, 88, 245, 268, 283.

The judgment creditors filed pleas and also answered the bill.

Record pp. 34, 37, 48.

The pleas were overruled because the answers were on file and without a consideration of the merits.

Opinion: Record pp. 101-103.

Proofs having been taken (Record pp. 127-196) and the answers of the respondents having been amended (Record pp. 77, 91) the Circuit Court after final hearing brought on upon August 14, 1899 handed

down an opinion, on August 28, 1899, upon which a decree was entered on September 26, 1899, dismissing the bill.

Record pp. 97, 98.

The bill shows the authorization of the mortgage and bonds to the extent of $50,000; the execution and delivery of the mortgage; the description of the mining and other property conveyed in the mortgage and located in the county of Nevada and state of California; the due formal execution and record of the mortgage; the acceptance of the trust by the trustee; the execution and delivery of the bonds authorized to be issued; the fact that they have been issued and are now outstanding; the default of the Mining Company in interest on the 1st day of July, 1893, and the subsequent default in principal under the terms of the mortgage; the existence of subsequent liens held by the respondents; the substitution of the petitioner as trustee in the stead of G. Livingstone Morse, who was originally selected and who accepted that position; and the fact that no other proceedings for the collection of the bonds secured by the mortgage have been had.

Bill. Paragraphs II-X; Record pp. 3-10.

The Defence of the Judgment Creditors.

The defence arising upon the amended answers of the *judgment creditors* consisted in the main of an allegation that the mortgage had not been authorized in conformity to the provisions of the first section of the Act of the Legislature of the State of California

passed April 23, 1880 and entitled "An Act for the further protection of *stockholders* in mining companies" requiring the assent of two thirds in amount of the stockholders of any mining company as a prerequisite to the sale, leasing or mortgaging of its land.

Amended Answers: Record pp. 68, 81-83.

UPON THIS DEFENCE THE FOLLOWING QUESTIONS AROSE:

1. Whether *judgment creditors* could under the circumstances take the benefit of the Statute mentioned and be heard to question the validity of the mortgage upon that ground.

2. Whether the Circuit Court was obliged to follow the decision of the Supreme Court of California holding that the question can be raised by judgment creditors.

3. Whether the Statute applied to foreign corporations.

4. Whether, if that Statute does apply to the defendant Mining Company, there was a sufficient authorization or ratification of the mortgage thereunder.

5. Whether independent of technical compliance with the terms of authorization or legal ratification laid down in the Statute mentioned, the mortgage and bonds which it secures have been validated by acquiescence and retention of consideration on the part of the Mining Company.

Under the denials of the amended answers the

complainant was also put to proof of the fact of the execution and delivery of the bonds and mortgage for value received by the Mining Company.

Testimony of Littlefield and Williams.

Record pp. 128-174.

An issue was also raised as to the proper formal execution of the mortgage but this was abandoned at the hearing before the Circuit Court of Appeals.

The Circuit Court did not pass upon all of the questions presented but decided:

A. That the Statute of 1880 applied to foreign corporations owning mining ground in California, by reason of the Constitutional provision (Constitution of California. Art. XII. §15) to the effect that "no corporation organized outside the limits of this State shall be allowed to transact business in this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State" and declares the public policy of the State.

B. That the statute in question does not refer to the internal management of mining corporations and is not therefore objectionable when applied to foreign corporations.

C. That the mode of ratification indicated in the statute is essential and exclusive.

D. That the stockholders of the Mining Company did not ratify the mortgage as required by the statute.

E. That the judgment creditors are not estopped to set up absence of ratification under the statute.

F. That the decisions of the Supreme Court of the State of California to the effect that judgment creditors may raise the question are not enunciatory of general or commercial law but are constructive of the statute and bind the Federal tribunals.

The Court considered none of the other points raised but dismissed the bill.

Decree. Record p. 97.

Upon appeal the Circuit Court of Appeals for the Ninth Circuit held

1. That the ruling of the State Supreme Court to the effect that judgment creditors could plead and take the benefit of the statute was a construction thereof and binding upon the Circuit Court.

2. That the statute related as to its first section to corporations foreign as well as domestic while as to its third and fourth sections it related only to domestic corporations.

3. That by decision of the Supreme Court of California a literal compliance with the first section of the statute was essential to the validity of a mortgage upon mining property; and that no such compliance was shown in the case at bar.

Record pp. 316-320.

A petition for rehearing was filed June 12, 1900, and denied October 15, 1900.

Record pp. 321-327; 328.

This petition, stating briefly the grounds therefor invited the Courts attention to the following propositions:

1. The opinion herein fails to distinguish between a ratification of the mortgage by a resolution of the stockholders and a "writing signed and acknowledged by such stockholders."

Record p. 321.

2. The Act of 1880 cannot refer to foreign corporations in any aspect without regulating the internal affairs of such corporations.

Record p. 324.

3. The Constitution of California is prohibitive of any construction of the Act of 1880 which would include foreign corporations within its provisions.

Record p. 327.

The petitioner now applies for a writ of certiorari and in support of this application invites attention to the following:

ARGUMENT.

I.

The decision of the Supreme Court of California to the effect that judgment creditors may take advantage of the Statute of 1880 is not binding upon the Federal Courts either as a construction of that Statute or determinative of a local rule of property.

The statute in question is entitled: "An act for

the further protection of stockholders in mining companies" and Section 1 thereof (until amended subsequent to the accrual of the rights of the parties hereto) read as follows:

"It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain, in any way, any additional mining ground, unless such act be ratified by the holders of at least two thirds of the capital stock of such corporation. Such ratification may be made either in writing signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders meeting called for that purpose."

Stats. Cal. 1880 p. 131.

Statutes of this character are common to many other of the States and although usually without title and merely forming sectional portions of revised or compiled laws, they have universally been held both by Federal and State Courts to be intended for the protection and security of the stockholders alone, who by their own action may be estopped to question the validity or regularity of the proceedings; so that it is necessary that even a stockholder should dissent in order that he may raise the question.

The State may in a proper case by direct proceeding avail of the objection but it can never be raised by creditors whether their claims have been reduced to judgment or not.

Hervey v. Ill., &c. Ry. Co., 28 Fed. 169.
(Mr. Justice HARLAN at Circuit in Illinois.)
Thomas v. Citizens Ry. Co., 104 Ill. 462.

Beecher Marquette &c., R. M. Co., 45 Mich. 103. (Per COOLEY, J.)

The Vigilancia 68 Fed. 781.

(U. S. D. C. S. D. N. Y. Affirmed U. S. C C. A. 2nd Circuit: 73 Fed. 452.)

Greenpoint Sugar Co. v. Whiting, 69, N.Y. 328.

Rochester Savings Bk. v. Averell, 96 N. Y. 467.

Star P. Co. v. Andrews, 9 N. Y. Supp. 731.

Campbell v. Argenta Co., 51 Fed. 1. (Circuit Court, Dist. of Montana.)

Boston &c. Co. v. Montana &c. Co., 89 Fed. 529. (Circuit Court: Dist. of Montana.)

Boyce v. Montauk & Co., 37 West Va. 73.

Coe v. East &c. Ry Co., 52 Fed. 531.
(Circuit Court, Northern Dist. of Alabama,)

Alabama &c. Co. v. McKeever, 20 S. Rep. 84. (Supreme Ct. Alabama.)

Antietam Paper Co. v. Chronicle &c. Co., 115 N. C. 143.

Gordon v. Preston, 1 Watts 385.

Cook on Corporations. (4th Ed.) §808.

Short on Railway Bonds and Mortgages, §181.

Said Mr. Justice HARLAN in the case of Hervey v. Illinois &c. Ry Co., 28 Fed. 169 (at pp. 173-174):

"Creditors of the before mentioned railroad companies, who are parties herein, claim that in the ex-

ecution of the mortgages in question certain requirements of the Statues of Illinois were not observed, and consequently that each of those instruments are void, ... The objection under consideration can have no application to any one of the sectional mortgages except that executed by the Paris & Terra Haute Railroad company, which was organized after the passage of the Act of 1872. But it cannot avail the parties making it for several reasons one of which is, that as the Paris & Terre Haute Railroad Company admits the execution and delivery of the mortgage, it must, *as between the company and its creditors*, be deemed a valid instrument. The provision in the Act of 1872, making the assent of a given number of stockholders essential to the validity of a mortgage is primarily, if not exclusively, for the benefit of stockholders, if it be conceded that stockholders of a railroad corporation formed under the act of 1872, could, as against *bona fide* holders of bonds secured by a mortgage executed by such corporation, defeat a mortgage not executed with the expressed assent of the requisite number of stockholders, it does not follow that the creditors of the corporation could raise any such question. Under the circumstances disclosed by the record, the stockholders of the Paris & Terre Haute Railroad Cempany are estopped to say that the mortgage is not a valid security, according to its terms for the payment of the bonds intended to be secured by it. Much less can creditors urge such an objection particularly when the State has not, by any direct proceeding, questioned the vality of the mortgage under the act of 1872."

Again, if we assume for purposes of argument that the Mining Company should be considered as a domestic corporation the case of Campbell v. Argenta etc. Co. 51 Fed. 1, presents practically the same situation.

There the question of compliance with the Montana statute, as precise at least as the Act of 1880, was sought to be raised by judgment creditors.

Said the Court upon this subject (pp. 8-9):

"The contract being a voidable one, the question arises as to who can take advantage of any defect in entering into the same. The rule that is established by the statute requiring a meeting of stockholders, etc., and the giving of their consent to the making of a mortgage was for the benefit of the stockholders of the corporation executing the bound by the rule expressed in *Railway Co. v. McCarthy*, (96 W. S. 258) and in accordance with it would have to hold that even the corporation and stockholders in this case would be estopped from asserting that the mortgage was void, although it might be held that it was beyond the power of the corporation to execute the same. But holding, as I do, that the mortgage was only a voidable contract, I have no difficulty in maintaining that the corporation and the stockholders in this case would be estopped from denying its validity. The bonds sued on in this case were the consideration for the property embraced in the mortgage; neither the corporation nor the stockholders have ever expressed any desire to disaffirm that contract. The contract was entered into with the knowledge of the stockholders; the corporation held and enjoyed the property so obtained; hence it would be a wrong to allow the corporation to disaffirm this mortgage, and, if neither the stockholders nor the corporation could now object to this mortgage, *much less could the creditors of the Argenta Company object to the validity thereof.*"

It is thus easy to see the reasons for the rule so generally applied. It is but one phase of the doctrine, well established in this Court, that no one but the state or a dissenting stockholder may avail of an *ultra vires* act particularly where the defect consists in the failure on the part of a corporation or its officers, directors or stockholders to comply with some formality prerequisite to the orderly performance of the function in question.

Jones v. Guaranty &c. Co. 101 U. S. 622.
Railroad Co. v. Ellerman 105 U. S. 166.

St. Louis &c. R. R. Co. v. Terre Haute &c. R. R. Co. 145 U. S. 393, 403.

Zabriskie v. R. R. 23 How. 381, 398.

Central Trans Co. v. Pullman's &c. Co. 139 U. S. 24, 42, 60.

Davis v. Old Colony R. R. 131 Mass. 258, 260.

See also Sioux City &c. Co. v. Trust Co. 82 Fed. 124, (U. S. C. C. A. 8th Circ.)

In Jones v. Guaranty &c. Co. 101 U. S. 622 creditors sought to attach a mortgage upon after acquired property as *ultra vires*. Said Mr. Justice SWAYNE of the mortgage in question (p. 628):

"If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the state. As to all other parties it must be held valid and may be enforced accordingly. *Silver Lake Bank v. North* 4 Johns (N. Y.) Ch. 370; *National Bank v. Matthews* 98 U. S. 621. In the latter case this subject was fully examined.

"A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage it has been cured by acquiescence and ratification by the mortgagor.

"*No one else can raise the question. All other parties are concluded. Gordon v. Preston* 1 Watts (Pa.) 385.

"Where money had been obtained by a corporation upon its securities which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders so far as the money thus raised is applied for the benefit of the company. *In re Cork & Yonghal Railway Co.* Law Rep. 4 Ch. 748.

"A court of equity abhors forfeitures and will not

lend its aid to enforce them. *Marshall v. Vicksburg* 15 Wall 146. Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Lewis v. Lyons* 13 Ill. 117."

This case and Railroad Co. v. Ellerman 105 U. S. 166 were both decided several years before the California Supreme Court decided the case of McShane v. Carter 80 Cal. 310, hereinafter referred to.

In the recent case of St. Louis &c. Railroad v. Terre Haute &c. Railroad 145 U. S. 393 this Court speaking through Mr. Justice GRAY say (at pp. 402-403.)

"The plaintiff relies on the Statute of Illinois of February 16, 1865 (in force at the date of this contract, but since repealed by the Revised Statutes of 1874) by which it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said *written* consent, signed by the resident stockholders in Illinois, *shall be null and void*"; and it was provided "that nothing in this act shall be so construed as to authorize the consolidation of any of said railroads with railroads out of the State of Illinois" Illinois Public Laws of 1865 p. 102.

Although this Statute in terms declares that any such lease made without the written consent of the Illinois stockholders, "shall be null and void," it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law an excess of which cauld not have been ratified or made good by estoppel; but only prescribed regu-

lations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped by lapse of time or otherwise to deny." (Citing numerous cases.)

To the same effect and referring to a statute like that under discussion, see the admirable opinion of Judge COOLEY in Beecher v. Marquette, &c., Co., 45 Mich. 103.

Notwithstanding this overwhelming weight of authority the Supreme Court of California by a divided Court three judges only sitting and both of those concurring being Commissioners appointed by law to assist the regular judges, decided the case of McShane v. Carter (80 Cal. 310) to the effect that judgment creditors might set up the Statute of 1880 as against the prior grantee of a domestic corporation. This decision was afterward in Pekin Mining Co. v. Kennedy (81 Cal. 356) applied without independent reasoning to the case of a grantee of a foreign corporation, which in fact although not so stated in the report was subject to the provisions of a similar statute in the State of its domicile (Illinois).

We submit that the decision in the *McShane Case* does not operate to construe the statute nor to enunciate a local rule of property and that therefore it is not effective to control the action of the Federal Courts in this case.

A. No statutory construction is involved.

Upon the proof before it the Supreme Court of California took this position in the following language with respect to the meaning and effect of the statute (80 Cal. 312):

"In our opinion the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two thirds of the stock, given as described in the Act."

So far there can be no doubt that the Court construed the act. But the Court then proceeds to draw the following *conclusions.*

(1) "*And it follows* without such consent the title does not pass."
(2) "*And if this be so,* the question can be raised by anyone who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof."

Why does this second conclusion follow? Certainly not from anything contained in the act itself, for upon this point it is absolutely silent and *there is nothing to construe or interpret.* It must depend upon the relation which to the Court's mind existed between judgment creditors ~~and their~~ of a corporation, on the one hand and its officers and stockholders on the other. The Court does not in the slightest degree intimate that there are any terms in the statute which under the well known rules of construction would indicate that the Legislature meant to include judgment creditors among the beneficiaries of the statute. The conclusion that they may raise the question is purely a conclusion not even derived directly from the ruling of the Court in the construction of the statute to the effect that in the absence of the ratification prescribed the directors "had no power to convey;" but is deduced as a sort of sub-conclusion of the conclusion (totally unwarranted under St. Louis &c. R. R. v. Terre Haute &c. R. R. 145 U. S. 403) that "without such consent the title does not pass."

With all due respect it is submitted that this conclusion so directly at variance with the great weight of authority and particularly so because of the plain and direct language of the title of the act, can in no sense be held to be a construction of the statute and therefore binding upon the Federal Courts. It is in fact and in law *a decision that judgment creditors are not estopped* to avail themselves of acts not even heinous enough to be *ultra vires* the corporation but merely irregular and beyond the power of the officers performing them. That this is a matter of general law seems scarcely more subject to argument than that the conclusion reached is directly contrary to the principles laid down by this Court as well as by the State and Federal Courts generally.

We may add that we do not think that the decisions of the State Courts of California to the effect that judgment creditors may in any case be considered beneficiaries under an act by its title limited to the "further protection of *stockholders*," are binding upon the Federal Courts; and it seems to us that the Circuit Court of Appeals failed to distinguish between a decision of the State Court construing the terms outlining the effect of the statute *as enacted* and a decision declaring that certain other persons not mentioned or referred to in the statute, may by reasons of relations existing between them and the stockholders *under general principles of corporation law*, become beneficiaries of the statute under consideration. We submit that a case of the latter class does not construe a statute or establish a rule of property, but

is merely a decision upon the general law of corporate relations.

In Sawyer v. Oakman (1 Lowell 134 Fed. Case No. 12,404) it was held that the effect which the statute of Massachusetts prohibiting work on the Lord's Day under a penalty should have on the rights of the parties to a collision cause pending in the District Court, one of whom has violated the act in moving his vessel on that day, is not a question of the construction of a statute *but of the application of general rules of law to the case of a person who has violated such a statute*, and the District Court must follow the decisions of the Supreme Court of the United States, and not those of the State tribunals.

Said LOWELL, J. (21 Fed. Cases 578):

"Now to the extent of holding that work done in contravention of the statute is illegal it may be that the local law should govern, but the statute is silent concerning the legal consequences of doing such an act excepting to the extent of the penalty directly imposed. The effect which it may have on the wrong-doer's standing as regards third persons is no part of the construction of the statute but the application of a general principle of law."

This case was affirmed by this Court in an opinion not reported (Reporters note, 21 Fed. Cas. 578) and its reasoning rests in great part upon that of Phila. &c. R. R. v. Philadelphia &c. Towboat Co. 23 How. 209.

In Bucher v. Cheshire R. R. Co. 125 U. S. 555 this Court (Mr. Justice FIELD and Mr. Justice HARLAN dissenting) followed *in a common law case* the established rulings of the Massachusetts Courts sustaining an Act to the effect that the Sunday Statute should be a defence to an action against a common carrier.

The opinion (per Mr. Justice MILLER) is harmonious with the remarks of Judge Lowell which we have just quoted, as follows (p. 580):

"It is not easy to see that there was anything in the case as it arose in the Circuit Court which required a construction of the meaning of that Statute, after eliminating what has just been suggested as to the significance of the words 'necessity' or 'charity.' The remainder is a short prohibition against travelling upon the Lord's Day, and provides for the imposition of a penalty for so doing. This is very plain; it admits of no doubt as to its meaning, and its validity has never been considered. When therefore the Supreme Court of Massachusetts in a long line of decisions, has held that the violation of this Statute may be set up as a defence to a liability growing out of the negligence of a railroad company in carrying passengers upon its road, it must have been on some other ground than that to be found in the statute itself. There is no provision in it, and there is no necessary inference to be drawn from its language that it was intended to control the relations between the passenger and the carrier or to modify the obligations of the one to the other."

The Massachusetts decisions were followed simply upon the ground that they established a rule of law of a *purely local* application.

In Olcott v. Supervisors, 16 Wall 678, it was held that whether or not the construction and maintenance

of a railroad owned by a corporation, and constructed and maintained under a statute of a State authorizing such construction and maintenance, is a matter in which the public has any interest of such a nature as to warrant taxation by a municipal division of the State in aid of it is a question of general law and not of statutory construction.

These cases we submit show that the question of statutory construction is not in the case at all so far as judgment creditors are concerned.

B. There is no local rule of property involved

In the *Pekin Mining Co. Case*, (81 Cal. 356) the rule laid down in McShane v. Carter *supra* was extended without argument to foreign corporations. The statute itself does not distinguish between foreign and domestic corporations so far as the first section goes. There is moreover no limitation within the State of the "mining ground" mentioned. If it be shown that this statute may affect property outside the limits of the State of California it would seem clear that there is no local rule of property involved.

In Warburton v. White, 176 U. S. 484, Mr. Justice WHITE says (p. 496) referring to community property laws in Washington Territory.

"The rule is subject to a limitation, which is that where State decisions have interpreted State laws *governing real property or controlling relations which are essentially of a domestic and State nature; in other words, where the State decisions establish a rule of property*, this court when called upon to interpret the State law will, *if it is possible to do so, in the discharge of its duty*, adopt and follow the settled rule of construction affixed by the State court of last re-

sort to the statutes of the State and thus conform to the rule of property within the State."

The Supreme Court of California has never had occasion to consider the position of judgment creditors claiming the benefit of a similar statute enacted by the Legislature of the state wherein the corporation had its domicle but not of the state wherein the land to be foreclosed or conveyed might lie. This question might however arise in a case where the corporation was domestic in California and part or the whole of its mining ground lay without the state and foreclosure should be instituted in the state of California. Under the principles laid down in Muller v. Dows 94 U. S. 444 (and applied in Woodbury v. A. & K. R. R. 72 Fed. 374, 375 where a land grant was also included in the foreclosure) such a foreclosure would be good as to property in the foreign state, and under *McShane v. Carter supra* we think there would be no doubt that the Court would apply the statute to the mortgage.

The New York statute however, so strikingly similar (See Petition for Rehearing Record p. 322 for parallel columns) has been under discussion in the case of First National Bank v. G. V. B. Mining Co. 89 Fed. 439 (affirmed by the Circuit Court of Appeals for the Ninth Circuit 95 Fed. 23), which was a suit brought in the Circuit Court for the District of Idaho to foreclose a mortgage upon land located within that state and made by a New York corporation. Objection was made that the New York statute had not been complied with and the Circuit Court and Circuit Court of Appeals both applied the New York law to the case. Similarly it would

have applied the California statute if the corporation mortgagor had been organized in that state.

It seems to us that there is no better example needed to show that statutes of the nature of that here in question may effect property outside the State and that they will be so enforced. Evidently decisions under such statutes or that judgment creditors may take advantage of them cannot be held to be of only local application.

THE CASES CITED BY THE CIRCUIT COURT OF APPEALS in its opinion (Record pp. 318-319) are either distinctively constructive of a local statute or determinative of a rule of property valid *only* within the local jurisdiction.

They refer to either (1) the omission on the part of the foreign corporation to take some action in which third parties are at the time concerned (even the filing of a particular paper, which is not required by the Act of 1880) in the State where the property is located; (2) the omission to properly execute the mortgage or deed under the laws of the State where the property is situated and (3) where there is a conflict of law as to the effect of the instrument as a mortgage or deed and the consequent devolution of property thereunder.

(See Petition for Rehearing: Record p. 326.)

II.

The Act of 1880 does not apply to foreign corporations because the legislation of any particular state has no effect upon the powers and internal management of cor-

porations organized in other states. The case of Pekin Mining Co. v, Kennedy supra is open to this objection and is therefore in conflict with the later case of Miles v. Woodward 115 Cal. 308.

The Constitution of California (Art. XII, §15) provides:

"No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

The Circuit Court of Appeals held that under this provision the Act of 1880, p. 131, was binding upon foreign corporations (Opinion Record pp. 316 *et seq*), and proceeded upon the theory that the statute did not relate to the conduct of the internal affairs of such corporations.

It has been established by the Supreme Court of the State of California in the case of Miles vs. Woodward 115. Cal. 308 (310) that:

"The constitution was not designed to limit the powers of the legislature when dealing with the organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. *Over the organization and internal government of foreign corporations it has no such power. The laws of the State do not have extra territorial force.* IT WOULD BE MEANINGLESS FOR THIS STATE TO TRY TO LEGISLATE UPON THE INTERNAL AFFAIRS OF SUCH FOREIGN CORPORATIONS AND IT HAS NOT ATTEMPTED TO DO SO."

While the Courts of California have never construed the Act of 1880 with respect to the limitation of the internal management of corporations whether foreign or domestic, similar statutes have been en-

acted in many states and it has been held by overwhelming authority that such provisions refer to the internal management of corporations as opposed to the transaction of their business with strangers.

Campbell v. Argenta &c. Co. 51, Fed. 1 citing numerous cases. (Dist. of Montana.)

First Nat. Bank v. G. V. B. Mining Co. 89, Fed. 439. (Dist. of Nevada.)

G. V. B. Mining Co. v. First Nat. Bank, 95 Fed. 23. (U. S. C. C. A. 9th Circuit.)

Wood v. Water Works Co. 44 Fed. 147.

Beecher v. Rolling Mill Co. 45 Mich. 103. (Cooley J.)

Zabriskie v. Cleveland &c. R. R. Co. 23 How. 381.

Hervey v. Railway Co. 28 Fed. 169. (Mr. Justice Harlan at Circuit.)

Louisville Trust Co. v. Louisville &c. Ry. Co. 43 U. S. App. 550.

S. C. 174 U. S. 552.

St. Louis &c. R. R. v. Terre Haute &c. R. R. 145 U. S. 393 at 403.

The case of Pekin Mining Co. v. Kennedy (81 Cal. 356) in deciding that judgment creditors of foreign corporations may question the validity of a prior mortgage under the Act of 1880 therefore in effect holds that the Legislature of California may legislate with respect to the internal affairs of foreign corporations. That such a view of the powers of the Legislature has since been repudiated in California appears in the opinion in Miles v. Woodward *supra*.

The contention of the respondents can only succeed upon the theory that the Legislature has power and has in fact *assumed to protect stockholders in a corporation organized and having its corporate existence under and by virtue of the laws of West Virginia.* Under the laws of West Virginia this mortgage was duly authorized and all corporate acts necessary to constitute it a properly executed instrument for creating a lien upon land were complied with. The question arises as to whether the Legislature of California has jurisdiction to prescribe what acts are necessary as between the corporation and its stockholders to authorize the execution of an instrument, which, upon its face, complies with all the formal requisites imposed upon such instrument by the California Laws. We submit that all the powers possessed by the mining company as a corporation and all its relations with its stockholders, grow out of and depend for their existence upon the sovereignty creating the corporation, and which alone may exercise visitatorial powers. The result of this proposition is that while the Legislature of California may regulate the form of instruments creating a lien upon or in any wise connected with the title to real property located within the limits of the state, and while it may even, *as it has not done,* impose license taxes and conditions precedent to the recognition of the foreign corporation in question, it has no power to dictate in what manner corporate action shall be evidenced, or in any other way interfere with the internal management of such corporation. *It may prescribe conditions upon the conduct of business in the state but it can not assume to make laws "for the protection" of stockholders in foreign cor-*

porations. The Legislature has never expressly provided that foreign corporations must take certain corporate action, such as described in Section 1 of the Act of 1880, in order to validate an instrument otherwise executed with due solemnity and we do not think that from any general terms claimed to be employed in isolated parts of the Act of 1880, it can be presumed that the Legislature intended any such action. The law upon the subject has been collated by Mr. Cook in his work on Stock and Stockholders at Section 779 and the elaborate note subjoined.

The attention of the Court is also invited to the following cases in support of the proposition above stated.

Saltmarsh v. Spaulding, 147 Mass. 224.
Vanderpoel v. Gorman, 140 N. Y., 563.
Demarest v. Flack, 128 N. Y., 205.
Coates v. Donnell, 94 N. Y., 163.
Miles v. Woodward, 115 Cal., 308.
American Water Works Co. v. Farmers L. & T. Co., 73 Fed., 956.

In Saltmarsh v. Spaulding, supra, the facts were these:

A foreign corporation was authorized by the laws of New Hampshire where it was organized, to make contracts and to purchase and convey necessary real estate, as well as to adopt by-laws to regulate the powers and duties of its officers. The directors, under a by-law authorizing them to manage and control its business, to hold meetings in Massachusetts, and to appoint necessary agents, ordered the president and treasurer, at a meeting held in Massa-

chusetts, to mortgage the real estate of the corporation, to secure its notes for borrowed money expended thereon: and these officers executed a power of sale mortgage in its name and under its seal. *Held*, that the directors acted within their powers and that the mortgage was valid.

The rationale of this decision appears in the opinion of DEVENS, J. at page 227, as follows:

"While the general principle undoubtedly is, that the law of the place where real property is situate exclusively governs as to the title of parties therein, the disposition and mode of transfer thereof, and the solemnity attending such transfers, and while we do not doubt, that it would be possible to provide by legislation that foreign corporations permitted to own real property situate in this State should only transfer the same by authority of the stockholders, no such provision has been made. (Attorney General v. Bay State Mining Co. 99 Mass. 148.) *While they must comply in their forms of conveyance with those here required, they derive their authority to make them from the rules imposed upon them by the State where they are created.*"

The case of Vanderpoel v. Gorman *supra*, succeeding the other New York cases above cited holds that an assignment for the benefit of creditors made in New York by an insolvent foreign corporation valid under the law of its domicile will be recognized as valid in New York. It is furthermore held that such an assignment is not violative of the provisions of the act "in relation to stock corporations." (Sec. 45 c. 564 Laws of 1890.) which prohibits a transfer or assignment by a corporation in contemplation of insolvency, and that that provision refers solely to domestic corporations; also that the right to make such an assignment exists inherently in all

corporations unless expressly forbidden, and the prohibition furnishes no legitimate evidence of the existence of a public policy in that State, which forbids in the case of a foreign corporation the exercise of this inherent right, and also that in the absence of any statute or by-law of the corporation providing otherwise such an assignment may be executed by the president and secretary under authority of its board of managers.

Said the Court, per PECKHAM, J. (now Mr. Justice PECKHAM of this Court) at page 570:

"The legislature declares, as above stated, that certain transfers or assignments made by the corporation shall be void. What power had the legislature to enact any such provision as to a foreign corporation? *There is nothing in the section limiting its scope and effect to such property as a foreign corporation might have within this State.* It is a broad enactment effecting every assignment made by a corporation under the circumstances mentioned. Can it be supposed that the legislature had in mind a foreign corporation and intended to assume a jurisdiction to declare such an act even when done outside this State, and in respect to property also outside of its boundaries, to be void and of no effect? This cannot be supposed, for we cannot impute to the legislature such ignorance upon the subject of its inability to give extra-territorial effect to its own laws. And if it had foreign corporations in mind when proposing to legislate upon the subject, and knew it could not effect the validity of such transfers outside of this State, and intended to provide that such transfers should not carry the title to property of the corporation held within this State and subject to our jurisdiction, it must be clear that language somewhat appropriate to express such purpose would have been used. The language actually used was neither apt nor pertinent for this purpose. It is both appropriate and pertinent when applied to domestic corporations only.

The language of the section clearly implies full and

complete jurisdiction over the whole subject matter . . . . . The legislature had such jurisdiction in the case of domestic corporations, while in the case of foreign corporations it had not."

The same conditions as to language employed and the meaning to be ordinarly attached thereto exists in the case at bar and make this New York case of particular interest and applicability.

In the case of the G. V. B. Mining Co. v. Bank 95 Fed. 23 the Circuit Court of Appeals affirming the Circuit Court for the District of Idaho has applied the New York law to a case where the corporation was organized there but mortgaged property in Idaho.

In view of the manifest intention of the Legislature by the Act of 1880, to add and make statutory provision with reference to the subject matter of the Act of 1874, the case of Miles v. Woodward, *supra* is extremely interesting and seems to indicate beyond doubt the thorough resolution on the part of the Supreme Court of California of the "meaningless" nature of any legislation which might tend to interfere with the internal management of foreign corporations. That case is, we think, an authority for the position of the complaint here. All these cases are based upon the underlying principle of comity universally recognized and applied in the Courts of the various states. In the ordinary course of such comity, the plaintiff's position cannot be attacked successfully; and to hold in favor of the respondents is in effect to take a position unwarranted by the genius of our institu-

tions and contrary to the established ruling of the Courts already made.

1. THERE WAS DUE CORPORATE ACTION BY THE STOCKHOLDERS.

III

Even if it should be held that the California Statute (Statutes of 1880 p. 131) does apply to foreign corporations, the mortgage is valid and a decree of foreclosure and sale should be directed.

On June 25, 1890, as appears by the minutes of that date, the incorporators constituting all of the stockholders held their first meeting. A telegram was read showing that the Certificate of Incorporation of the Company had been filed in the office of the Secretary of State of West Virginia on June 23rd., and

"On motion of W. W. Tucker, seconded by R. H. Pettigrew, Jr., it was '*Resolved*': That the said Gold Hill Mining Company, issue one hundred first mortgage bonds of the denomination of five hundred dollars each, each bond bearing date of July 1st, 1890; and bearing interest at the rate of ten per cent. per annum, payable semi-annually on the first day of January and July in each year, and so run five years from July 1st. 1890; with the privilege of said company paying off and redeeming the same sooner, by giving to the holders of said bonds six months notice of the company's intention thus to do; to pay off said bonds, and redeem the same on any day interest is payable or on payment of six months interest in advance; and the president and the secretary of said company are hereby authorized and directed to execute said bonds and mortgage for said company, and the said Board hereby authorize and direct the seal of said company to be affixed to the same."

Record pp. 153, 154.

On the 10th day of July, 1890, at a meeting of the Board of Directors at which all members of the Board were present, Mr. Shoecraft was elected president, Mr. Morse, vice president and Mr. Littlefield, secretary and treasurer and it was further "Resolved," that the mine be purchased of Shoecraft, for the stock and bonds secured by first mortgage mentioned in the resolution, (See Minutes Record p. 136.) There is not one resolution or any hint of action on the part of the stockholders or the board in any wise repudiating or questioning the validity of this mortgage which was executed under these resolutions and acknowledged on the 24th day of July, 1890.

In the first place it appears that the action taken at the meeting of June 25th, 1890, by the persons who constituted the incorporators, the stockholders under the Articles of Association and the first board of directors elected at the meeting was properly taken by those present in their capacity as stockholders, although the minutes designate them as incorporators. As a matter of fact their function as incorporators of the company ceased upon the filing of the articles and the acceptance thereof by the State authorities of West Virginia.

Cook on Corporations, (4th Edition) Sec. 10 and cases cited in notes.

Chase v. Lord 77 N. Y. 1, 11.

The meeting of June 25, 1890, was, we think, entirely valid as a stockholders' meeting.

It was held under a similar statute in Illinois that where directors are the only stockholders but one and they all assent their meeting as directors is in effect a stockholders' meeting and their vote a sufficient ratification by two thirds in interest of the stockholders.

Thomas v. Citizens &c. Ry. 104 Ill. 462.

The law of course looks to the substance and no such substantial *or any* compliance with the statute appears in the California case relied upon by the Circuit Court of Appeals affirming the Circuit Court in its opinion that no due corporate action had been taken.

2. THE MORTGAGE ITSELF HAVING BEEN SIGNED BY OFFICERS HOLDING MORE THAN TWO THIRDS OF THE CAPITAL STOCK OF THE MINING COMPANY, THE STATUTE OF 1880 HAS BEEN COMPLIED WITH.

Even if, however, it should be admitted, as is not the case of course, that the California statute does apply to this case that there has not been proper corporate action and that judgment creditors can be heard to raise the question, it is respectfully submitted that there has been a clear and unequivocal compliance with the terms of the statute, by way of written consent so that even if the Mining Company were a domestic corporation, its mortgage would be held good.

The statute provides that the instruments referred to in it may be ratified in one of two ways:

(1) "Either in writing signed and acknowledged by such stockholders" or

(2) "By resolution duly passed at the stockholders' meeting called for that purpose."

The Circuit Court of Appeals proceeded upon the theory that because no resolution was actually passed in literal compliance with the statute, there was no ratification such as required.

It is quite clear that the other alternative by way of writing signed by two thirds of the stockholders would be sufficient to sustain the validity of the mortgage in question.

The question at once arises whether the fact that Shoecraft and Littlefield, the President and Secretary of the Company, signing the mortgage held at that time more than two thirds of the capital stock is a sufficient compliance with the statute as a ratification by consent.

This matter was argued in the petition for rehearing (Record pages 321 to 324) to which the Court's particular attention is called.

Examination of the case of McShane v. Carter (80 Cal. 310) shows that the deeds in question "were authorized by the Boards of Directors of said respective companies, and were executed by the proper officers but were not ratified by the stockholders of said corporations." (p. 311)

By the most ordinary use of language this finding means that there was no ratification in either of the

methods outlined in the statute so that the decision of the Court proceeded upon a violation of both alternatives, by either of which the mortgage might have been validated. The case of Pekin Mining Company v. Kennedy (81 Cal. 356) shows (p. 359) that "there was no evidence offered, however, to show that the deed had been authorized by the trustees of the corporation or that it had been ratified by two thirds of the stockholders, nor was there any other proof of its execution." It was therefore held that the title remained in the company and the Court added (p. 363): "This result comes from the fact that no evidence was offered to prove that the deed was ratified by two thirds of its stockholders as provided in section 1 of the act concerning mining corporations which went into effect April 23, 1880." (Stats. 1880 p. 131).

Indeed as it appears in the Pekin case two very significant facts appear: (1) There was no authorization even by the directors and (2) there was no evidence of ratification in either of the methods provided in the statute.

Examination of the case of Granite Gold Mining Co. v. Magginis (118 Cal. 131 at 136) and Johnson v. California Lustral Co. (59 Pac. 595) in both of which this Court will observe the tendency of the California Court to limit the meaning of the act in question, shows that in the first of these cases the deed was admitted in evidence "without proof of the consent or ratification of stockholders as required by the Act of April 23, 1880" and that in the latter no further proof of authority was adduced and the

salutary rule laid down that the statute in question "must be enforced according to its intent."

It seems therefore that the validity of the execution of the mortgage by persons owning two thirds of the stock as a compliance with the Statute of 1880 has never been passed upon by the California Courts, so that as to this question, the decision of the Circuit Court was entirely untrammelled. As a matter of fact examination of the opinions both of the Circuit Court and the Circuit Court of Appeals, shows that the point was not decided by any direct reference to the facts, although it was particularly emphasized in the petition for rehearing in the Circuit Court of Appeals as well as in the brief presented to that Court.

Since the argument in the Circuit Court and before this case came up in the Circuit Court of Appeals, the latter Court had, however, passed upon an analogous set of facts not nearly so strong as those now presented and had held in favor of the validity of the mortgage. This decision is that of G. V. B. Mining Co. v. First National Bank (95 Fed. 23). In that case the New York statute was construed between the mortgagor and the mortgagee and it was held that where the President and Secretary of the mortgagor company executing a mortgage with another party who had endorsed his written assent as stockholder thereon together owned more than two thirds of the company's stock, the mortgage was in entire satisfaction of the provisions of the New York statute.

Unless therefore there was some distinction be-

tween the New York statute and the California Act of 1880, in the favor of the mortgage in that case, it would follow, it seems to us, as a matter of course that the fact that Shoecraft and Littlefield held more than two thirds of the stock of the Mining Company, made their execution of it, a compliance with that portion of the statute requiring that ratification may be made "in writing signed and acknowledged by such stockholders."

That Shoecraft and Littlefield held that proportion of the stock appears fully in the testimony.

Stock Certificates Nos. 1-21 following.

Record p. 313.

As a matter of fact the New York statute which is set out at length in the petition for rehearing (Record p. 322) differs from the California statute with respect to acknowledgment and filing of the consent, the New York statute requiring its filing but the dispensing with its acknowledgment and the California statute requiring an acknowledgment but no filing.

It is, of course, apparent that under the Californai statute a separate paper signed by the requisite number of stockholders might be executed and filed away among the papers of the company and never actually come to the knowledge of the mortgage or bond holders. Nevertheless such a paper would clearly be sufficient to validate a mortgage; but it is to be particularly noticed that neither of these statutes required that the written consent shall be by separate paper and in the case we have just cited, the Circuit

Court of Appeals for the Ninth Circuit held that under the New York statute no separate paper was needed. We do not see how it is possible to evade the conclusion that the same rule applies to the California statute.

Moreover the showing made in the *G. V. B. Mining Co. case* was more slender than that in the case at bar, because the endorsement of the third stockholder was necessary to make up the two thirds interest. In the present case that amount of stock was held, as we have shown, by the parties signing and acknowledging the mortgage.

We submit therefore that there was such apparent error on the part of the Circuit Court of Appeals and to the great detriment of the petitioner, that this Court should intervene to correct it.

3. ASIDE FROM FORMAL STATUTORY RATIFICATION, THE MINING COMPANY IS ESTOPPED TO DENY THE VALIDITY OF THE MORTGAGE ON ACCOUNT OF ITS ACQUIESCENCE AND ACCEPTANCE OF THE CONSIDERATION FOR THE CREATION OF THE MORTGAGE LIEN, AND THIS ESTOPPEL BINDS JUDGMENT CREDITORS.

The Circuit Court held the mortgage invalid because in its opinion the instrument was not formally ratified in the statutory manner prescribed and thus affirmed.

Record pp. 111, 123, 316-317.

Assuming that the Court was correct in finding no ratification in the precise mode outlined in the

statute it by no means follows that the corporation and those claiming under it may not in equity be held to have ratified or become estopped by *its* conduct from avoiding the apparent legal effect of the instrument.

The Court appears to have overlooked this principle and in effect held that foreign corporations *although as insisted, standing on the same footing under the Act of 1880 as domestic corporations*, were only bound when a technical statutory ratification had been shown and not otherwise.

We submit that there is no authority for this position and that the great weight of decisions including those of the Supreme Court of California shows that the mode of ratification prescribed in the statute does not preclude an estoppel, where as here the defect is not one of power in the corporation but only irregular execution of that power as between the corporation and its directors and officers.

In G. V. B. Min. Co. v. First Nat. Bank 95 Fed. 33, this Court said:

"A contract of a corporation which is *ultra vires* is something outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature. Such a contract is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side could give the unlawful contract any validity, or be the foundation of any right of action upon it. But, when a corporation is acting within the general scope of the

powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence, or to its action, because such requisites might in fact have been complied with."

In the case of Gribble v. Columbus Brewing Co. 100 Cal. 67 the action was to foreclose a mortgage. The assignee in insolvency who was also a party appealed from a decree on the pleadings. It was held that where the answer denied the authority of the president of the corporation to execute the mortgage but did not deny the facts constituting an equitable ratification of his acts, plaintiffs were entitled to judgment without proof of the president's original authority.

This is entirely consistent with and cumulative to the decision of the same Court in the case of Underhill v. Santa Barbara, etc., Co., 93 Cal. 300, where it is held that acts of directors in violation of a by-law may be ratified by the stockholders, and generally by the same number of shareholders that would be necessary to enact them; and such ratification need not be formally made in a meeting of the stockholders, but may be presumed from the circumstances of the case, such as long acquiesence in acts beneficial to the corporation with knowledge of all the material facts and may even be presumed without evidence.

Bearing in mind that under the laws of California the powers of corporation can only be exercised through the medium or instrumentality of their boards of directors, the action of the stockholders

alone not being enough (Gashwiler v. Willis 33 Cal. 12. Alta Silver Mining Co. v. Alta Placer Mining Co., 78 Cal. 629) and also that modes of ratification have been pointed out by statute, (Civ. Code §§ 2309, 2310.) the case of Blood v. La Serena Mining Co., 113 Cal. 221 conclusively shows the correctness of the position of the appellant.

There the only authority upon which the president and secretary of a corporation acted in executing a note and mortgage in its name was a resolution passed at the preliminary meeting of the stockholders and before organization of the board of directors. This was held to be insufficient authority and although it was expressly held that there were no acts of "ratification" satisfying the code provisions, still those provisions were so far unconclusive that the mortgagee might recover upon the theory of estoppel and that the estoppel need not be pleaded under the rule laid down in Goetz v. Goldbaum, 37 Pac. Rep. 646.

Said the Supreme Court of California *per* HENSHAW, J. (at pp. 226 *et seq*):

"It is a general principle that a corporation like an individual may ratify and validate any authorized act, the doing of which it would, in the first instance, have authorized and empowered. What conduct and proceedings will constitute and amount to a ratification is a question which the Courts have been called upon to decide with great frequency. In the literature of the law which is thus full upon the subject there has often been little inclination displayed to distinguish between ratification and estoppel *in pais*. The facts are usually set forth at length, and the conclusion is reached and expressed that such conduct amounts to ratification; and in

deed where the form which the ratification must take is not governed by statutory rules, it may and usually does matter little whether the acts of a principal are said to be such as to constitute a ratification or to be such as to constitute an estoppel. By either name he is held equally bound: But the distinction between the two is nevertheless well defined, and where, as in this State, the mode of ratification is governed by statute it becomes important and necessary to distinguish them. Acts and conduct amounting to an estoppel *in pais* may in some instances, amount also to ratification, but, on the other hand, ratification may be complete without any of the elements of estoppel. The elements of an estoppel *in pais* have for so long been settled in this State that it is superfluous even to refer to the leading cases of *Boggs v. Merced Min. Co.* 14 Cal. 279; and *Martin v. Zellerback* 38 Cal. 300.

The requisites and forms of ratification however are entirely within the provisions of the code . . . . . Ratification is thus a question of legal cognizance, while estopped *in pais* addresses itself to equity. Ratification under our code is a legal term with a well defined and specific meaning, and to use it interchangeably with estoppel, or with the verbs 'to adopt' or 'to confirm' must result and has resulted in unfortunate confusion . . . . . (page 228). Now while ratification may be proved under a plea of due execution (*Goetz v. Goldbaum* 37 Pac. Rep. 646), yet the evidence in this case falls short of proving it, and more strongly tends to establish an estoppel."

The case was sent back for a new trial because the trial court had disposed of the case on the question of ratification in plaintiff's favor, and had made no finding on the estoppel.

The same general rule has been recognized without question by Ross J. in the case of Foster v. Bear Valley Irrigation Co. 65 Fed. 836.

These cases show the general policy of the State of California upon the subject of estoppel or equita-

ble ratification; but it is nevertheless contended by the appellees, and that contention appears to have been sanctioned by the Circuit Court of Appeals that the cases of McShane v. Carter 80 Cal. 310, and Pekin Mining Co. v. Kennedy 81 Cal. 356, are applicable and prevent a decree of foreclosure.

This position, if it were true, would be in direct contradiction of the general rule established by the cases which we have just cited. The provision with relation to ratification as contained in the Statute of 1880 is not one whit more mandatory than the code provisions, nor can it in any greater degree affect the application of the doctrine of estoppel.

In both cases the Court seems to have entirely overlooked the distinction between contracts, *ultra vires* the corporation itself and those within its powers but dependent upon certain forms and methods by which those powers may be exercised: i. e., the difference between void contracts incapable of ratification by acquiescence and voidable contracts which may be so ratified.

In the case of Blood v. LaSerena Mining Co. 113 Cal. 221, we have seen that a mortgage *absolutely unauthorized and never ratified according to statutory requirements* may be validated by estoppel, so that where there have been sufficient facts to make out an equitable estoppel we submit that it is absurb to argue that the *McShane* and *Pekin Mining Co.* cases have any application.

Statutes similar to the Act of 1880 exist in many of the states and it has been uniformly held that they

in no wise nullify the application of the doctrine of estoppel whether based upon acts of recognition or the retention of benefits under the instrument. The Courts are alert to apply the distinction between acts void as to the company and those merely unauthorized by it but capable of validation under the general rules governing voidable acts. In some of the older cases the confusion of these classes of acts has led to erroneous and apparently conflicting decisions but the distinction has been so strongly emphasized by the later cases that it should never be lost sight of.

St. Louis &c. R. R. v. Terre Haute &c. R. R. 145 U. S. 403 and cases cited.

Campbell v. Argenta &c. Co. 51 Fed. 1.

G. V. B. Mining Co. v. Bank 95 Fed. 23.

Nevada &c. Syndicate v. Nat. Nickel Co. 96 Fed. 133.

Sioux City &c. Co. v. Trust Co. 82 Fed. 124.

Aurora &c. Soc. v. Paddock 80 Ill. 263.

McCurdy's Appeal 75 Pa. St. 290.

Wood v. Whalen, 93 Ill. 153.

Hanson v. Annapolis, etc. R. R. Co., 50 Md. 490.

Fidelity Co. v. S. V. R. R. Co., (W. Va.) 9, S. E. Rep. 180.

Trader v. Jarvis, 23 W. Va., 100, 108.

Texas etc. Ry. Co. v. Gentry, 69 Texas 625.

Page v. Fall River R. R. Co., 31 Fed. 257.

Merchants' Bank v. State Bank, 10 Wall 608.

See also Mining Co. v. Anglo-Californian Bank, 104 U. S. 192.

Moreover where benefits have been retained even under *ultra vires* acts, the corporation and its creditors are estopped to raise the question.

Jones v. Guarantee, &c. Co. 101 U. S. 622.
R. R. Co. v Ellerman 105 U. S. 166.
Bank v Matthews 98 U. S. 621.

This is based upon the well recognized rule of equity that the doctrine of *ultra vires* when invoked for or against a corporation should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.

Railway Co. v. McCarthy, 96 U. S. 258.
Jones v. Guarantee &c Co. *supra.*

The right of the petitioner here is we submit inherently just and makes this rule applicable.

The bonds issued upon have naturally passed into the hands of numerous holders for value and as they are negotiable in form, if for no other reason they would on that account be entitled to the protection of this Court. Having been issued, however for valuable consideration with the full consent of the stockholders and board of directors and through repeated ratification these bonds under those principles of justice and equity upon which the Courts have uniformly proceeded are entitled to protection and the foreclosure should be decreed. A merely casual glance at the minutes in evidence will show the great number of meetings at which resolutions were passed, the effect of which clearly shows the intention on the part of the stockholders

and the board to recognize the bonds as valid outstanding obligations and the mortgage as legal security for them.

Record pp. 133, 135, 137, 142, 148, 149, 151.

Upon the question of value received for the bonds and the mortgage securing them the evidence on the complainant's behalf is uncontradicted and showed that one half of the issue was part of the purchase price of the mine.

Record pp. 134-141, 147-151, 172, 195.

WE ARE OF COURSE AWARE of the doctrine promulgated by this Court in the case of the American Construction Company against the Jacksonville Railway Company (148 U. S. 383) to the effect that the Court will exercise its discretion in granting writ of certiorari only sparingly and with great caution; and in any event we should approach this application with great diffidence did we not after a careful examination of numerous authorities, feel convinced that the position taken by the Courts below is erroneous as well as effective of a grievous hardship upon the petitioner. The importance of a determination of the questions submitted relating to the application of the *lex domicilii* and the *lex rei sitae* to questions arising upon the conveyance, mortgaging or other transfer of property located in a different State from that under whose laws the corporation owning or mortgaging it, was organized, is submitted to this Court with the conviction of its general and far reaching effect.

Moreover as we have endeavored to show the great weight of decision favors the position of the petitioner in this case, is conformable to natural justice and right and the only Court taking a different view of the law, is the Supreme Court of a single State, to wit, California.

It is submitted therefore that the writ prayed for should be granted.

C. WALTER ARTZ,
For Petitioner.